

YAVAPAI COUNTY ATTORNEY'S OFFICE
JOSEPH C. BUTNER SBN 005229
DEPUTY COUNTY ATTORNEY
255 East Gurley Street
Prescott, AZ 86301
Telephone: 928-771-3344
ycao@co.yavapai.az.us

JEANETTE L. CLARK
FILED
NIGHT DEPOSITORY

2010 JUN -1 PM 3:31
FILED

B. Chamberlain
DEPUTY CLERK

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

MOTION FOR LEAVE TO FILE
AMENDMENT TO THE INDICTMENT
RE: AGGRAVATING CIRCUMSTANCE

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby moves this Court for leave to file an amendment to the Indictment for purposes of alleging aggravating circumstances pursuant to *Arizona Rules of Criminal Procedure*, Rules 13.5(a), 16.1(b) and 16.1(c).

MEMORANDUM OF POINTS AND AUTHORITIES

On or about October 27, 2008, the State filed an allegation that it intended to seek the death penalty in this case alleging aggravating circumstances pursuant to A.R.S. §§ 13-703(F)(2), 13-703(F)(5), and 13-703(F)(13). On or about November 21, 2008, the State filed an amended notice adding the A.R.S. § 13-703(F)(12) allegation. On January 2, 2009, the case was remanded to the grand jury for a new finding of probable cause which was returned on February 6, 2009. Defendant filed a second motion to remand. Following denial of the second

1 motion to remand, the State re-alleged the capital aggravators on May 13, 2009. On June 29,
2 2009, the notice was amended to included the aggravating circumstance pursuant to A.R.S. §
3 13-703(F)(6).

4 Following a *Chronis* Hearing¹ this Court found the State had probable cause to allege
5 the death penalty aggravators pursuant to A.R.S. §§ 13-703(F)(2), 13-703(F)(5), and 13-
6 703(F)(6). Since that time Defendant has been on notice the State had sufficient evidence to
7 present to a jury the aforementioned sentencing aggravating circumstances. Two (2) death
8 penalty aggravators pursuant to A.R.S. §§13-703(F)(2), and 13-703(F)(6) were dismissed as
9 a Court ordered sanction.

10 On May 26, 2010 the State moved to dismiss the death penalty and this Court
11 immediately granted the motion without opposition from the defense. As a direct result of the
12 dismissal of the death penalty, the aggravating circumstance of pecuniary gain pursuant to
13 A.R.S. §13-703(F)(5), was automatically dismissed.

14 The dismissal of the death penalty and the aggravator factor of pecuniary gain
15 occurred between the time the parties were conducting voir dire of the jury and before the
16 jury has been seated. This jury will be deciding the guilt or innocence of the defendant on
17 charges of pre-mediated first degree murder and armed burglary. Due to the procedural
18 circumstances of this case, the State could not file any non-capital sentencing allegations of
19 aggravating circumstances until the death penalty was dismissed.

20 Rule 13.5(a) allows the prosecutor to amend an indictment to add an allegation of one
21 or more non-capital sentencing aggravators that must be found by a jury. "Absent the
22

23
24
25
26

¹ *State v. Chronis*, 220 Ariz. 559, 208 P.3d 210 (2009)(a defendant has a right to a probable
cause determination for alleged death penalty aggravators).

1 defendant's consent, a criminal 'charge may be amended only to correct mistakes of fact or
2 remedy formal or technical defects.' *Ariz. R.Crim. P. 13.5(b).*" *State v. Freeney*, 223 Ariz.
3 110, ¶ 1, 219 P.3d 1039, 1040. "A defect may be considered formal or technical when its
4 amendment does not operate to change the nature of the offense charged or to prejudice the
5 defendant in any way.' *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980)." *Id.* at ¶
6 11, 219 P.3d at 1041. Rule 16.1(b) requires the filing of all motions no later than 20 days prior
7 to trial, or at such other time as the court may direct. Rule 16.1(c) precludes a motion not
8 timely raised unless the basis therefore was not then known, and by the exercise of reasonable
9 diligence could not have been known and the party raises it promptly upon learning of it.

11 CONCLUSION

12 The State submits that procedurally it could not allege non-capital sentencing
13 aggravating circumstance pursuant to A.R.S. §13-702 until after the dismissal of the death
14 penalty on May 26, 2010.

15 Pursuant to Rule 13.5, *Ariz.R.Crim.P.*, and *Blakely v. Washington*, 542 U.S. 296, 124
16 S.Ct. 2531 (2004), the State moves this court for leave to file the following aggravating
17 circumstances:

- 18 1. Use, threatened use or possession of a deadly weapon or dangerous instrument
19 during the commission of the crime. A.R.S. Sec. 13-702(C)(2) (the State will not
20 allege this aggravator for the armed burglary offense);
- 21 2. Especially heinous, cruel or depraved manner in which the offense was
22 committed. A.R.S. Sec. 13-702(C)(5);
- 23 3. Defendant committed the offense(s) as consideration for the receipt, or in the
24 expectation of the receipt, of anything of pecuniary value. A.R.S. Sec. 13-
25 702(C)(6);
- 26 4. The victim or, if the victim has died, the victim's immediate family suffered

Office of the Yavapai County Attorney

255 E. Gurley Street, Suite 300

Prescott, AZ 86301

Phone: (928) 771-3344 Facsimile: (928) 771-3110

1 physical, emotional and financial harm caused to the victim(s). A.R.S. Sec. 13-
2 702(C)(9);

3 5. Lying in wait for the victim(s) or ambushing the victim(s) during the commission
4 of any felony. A.R.S. Sec. 13-702(C)(17);

5 6. Dangerous felony offense(s) pursuant to A.R.S. Sec. 13-604.

6
7 RESPECTFULLY SUBMITTED this 25th June, 2010.

8
9 Sheila Sullivan Polk
10 YAVAPAI COUNTY ATTORNEY

11 By: [Signature]
12 Joseph C. Butner
13 Deputy County Attorney

14 COPIES of the foregoing delivered this
15 1st day of June, 2010 to:

16 Honorable Thomas J. Lindberg
17 Division 6
18 Yavapai County Superior Court
(via email)

19 John Sears
20 511 E.. Gurley St.
21 Prescott, AZ 86301
Attorney for Defendant
(via email)

22 Larry Hammond
23 Anne Chapman
24 Osborn Maledon, P.A.
25 2929 North Central Ave, 21st Floor
Phoenix, AZ
Attorney for Defendant
(via email)

26 By: [Signature]